COCA-COLA FAR EAST LTD

v.

YB MENTERI SUMBER MANUSIA & ORS

HIGH COURT MALAYA, KUALA LUMPUR
FAIZA TAMBY CHIK J
[ORIGINATING MOTION NO: R2-25-50-2001]
28 AUGUST 2002

ADMINISTRATIVE LAW: *Remedies - Certiorari - Application to quash decision of minister of human resources to refer representation to Industrial Court - Whether minister exceeded jurisdiction - Whether applicant subject to jurisdiction of Industrial Court - Whether representation time-barred - Whether representation frivolous or vexatious*

This was an application by the applicant for an order of *certiorari* to quash the decision of the first respondent to refer the third respondent's representation to the Industrial Court under s. 20(3) of the Industrial Relations Act 1967 ('the Act'). The third respondent had been employed as the country manager for Malaysia by the applicant before being told that he would be replaced by someone else. The third respondent sought to resolve his position in the company but to no avail. The third respondent submitted that after the callous manner in which the company had treated him and its failure to reinstate him to his former position of country manager, he had no choice but to consider himself constructively dismissed. The applicant contended that the first respondent had committed an error of law in excess of jurisdiction in that: (1) the third respondent's claim was frivolous and vexatious; (2) the first respondent had omitted to take into account that the third respondent's employer was Coca-Cola Export Corporation, Australia, and that therefore, the second respondent did not have extra territorial jurisdiction upon the matter; (3) the third respondent's claim for reinstatement filed under s. 20(1) of the Act was filed outside the 60-day limit under s. 20(1A) of the Act; (4) the first respondent had failed to take into account that the applicant was only a branch office of the Coca-Cola East Limited, Hong Kong, and not the employer of the third respondent; and (5) the first respondent had failed to take into account relevant considerations and/or had taken into account irrelevant considerations in making his decision.

Held:

[1] On the facts, the third respondent was, in fact and in law, an employee of the applicant at all material times and since the applicant was registered in Malaysia and operated an office in Malaysia, the applicant was subject

to the jurisdiction of the Industrial Court of Malaysia in respect of the third respondent's claim of unfair dismissal. The power to dismiss the third respondent was not vested in the Australian or the Hong Kong companies, but in the applicant. (pp 489 g & 493 b-f)

[2] On the facts, the 60-day time frame did not commence from the date when the third respondent was replaced in his position of country manager as the third respondent was still seeking a resolution of his status of employment with the applicant. The third respondent only considered himself constructively dismissed with effect from 10 September 1998 when the applicant failed to remedy his grievances. Therefore, time under s. 20(1A) of the Act began to run from 10 September 1998, and the third respondent's representation filed on 11 September 1998 was not time-barred. (p 495 e-f)

[3] In the instant case, the third respondent was employed by the applicant, and the applicant was an employer within the jurisdiction of the Industrial Court. The matter of the third respondent's constructive dismissal was not frivolous or vexatious, and ought to be adjudicated in the Industrial Court. (p 497 e)

[Application dismissed.]

Case(s) referred to:

Comex Services Asia Pacific Region, Miri v. Graeme Ashley Power [1987] 2 ILR 34 ***(refd)***

Datuk Bandar Kuala Lumpur v. Zain Azahari Zainal Abidin [1997] 2 CLJ 248 CA ***(refd)***

Minister of Labour, The Goverment of Malaysia v. Lie Seng Fatt [1990] 1 CLJ 1103; [1990] 1 CLJ (Rep) 195 SC ***(foll)***

Mostek Malaysia Sdn Bhd, Penang v. Aniza Yaacob & Ors [1986] 2 ILR 1276 ***(refd)***

Kathiravelu Ganesan & Anor v. Kojasa Holdings Bhd [1997] 3 CLJ 777 CA ***(foll)***

Pan Global Textiles Bhd. Pulau Pinang v. Ang Beng Teik [2002] 1 CLJ 181 FC ***(foll)***

Legislation referred to:

Industrial Relations Act 1967, ss. 2, 20(1), (1A), (3)

For the applicant - M Jothi; M/s Ramadass & Assocs

For the 1st respondent - Narimah Morris (Nizam Zakaria & Azizah Nawawi); AG's Chambers

For the 3rd respondent - P Jayasingam (KC Wong); M/s Zul Rafique & Partners

[The application has appealed to the Court of Appeal vide Civil Appeal No: W-01-55-02.]

Reported by Suresh Nathan

JUDGMENT

Faiza Tamby Chik J:

This is an application (encl. 7) by the applicant for, *inter alia*, an order of *certiorari* to quash the first respondent's decision made on 10 April 2001 to refer the representations of the third respondent to the Industrial Court under s. 20(3) of the Industrial Relations Act 1967 ("the Act"). Pursuant to the said decision of the first respondent the third respondent's case has been registered in the Industrial Court as Case No. 3/4-362/01 and the matter has been fixed for hearing on 28 May 2002. There is currently a stay order granted by this court prohibiting the proceeding of the third respondent's case in the Industrial Court until the determination of this instant matter. The third respondent was first employed by Coca-Cola Bottlers Sydney Pty Ltd in Australia with effect from 1 January 1984. This company was a subsidiary of The Coca-Cola Export Corporation in Australia which in turn was owned and operated by The Coca-Cola Company based in the United States of America. On 1 July 1985 the third respondent was transferred to the Coca-Cola Export Corporation in Sydney, Australia. *Vide* a letter dated 17 June 1986 the third respondent was offered the position of National Accounts Executive by the Coca-Cola Export Corporation in Australia with effect from 1 July 1986. *Vide* a letter dated 29 April 1993 the third respondent was promoted to the position of marketing manager in Coca-Cola West Africa based in Abidjan Cote d'Ivoire, West Africa, wherein he was made responsible for the marketing functions in 23 countries in West Africa. *Vide* a memorandum dated 13 May 1993, Coca-Cola West Africa announced the appointment of the third respondent as marketing manager of the West Africa Division. On 1 April 1995, the third respondent was appointed as Director of Marketing for Coca-Cola Northern Africa Division based in Nairobi, Kenya, wherein the claimant was made responsible for the marketing functions in 39 countries. *Vide* a letter dated 20 March 1995 the terms and conditions of this appointment was confirmed. On 1 July 1996, the third respondent was promoted to the position of country manager of the Republic of Pakistan based in Lahore. *Vide* a letter dated 8 October 1997, the third respondent was offered the position of country manager of the applicant company with effect from 1 January 1998 which the third respondent duly accepted. The terms and conditions of this appointment were contained in the said letter of 8 October 1997 (see exh. WJC-12 of encl. 12). As required, the third respondent reported for duty in Malaysia on 7 January 1998. The third respondent's family followed him to Malaysia as the third respondent expected his employment with the applicant company in Malaysia to extend from three to five years as stated in his letter of appointment. Under the third respondent's terms and conditions of service with the applicant company, his basic salary

was US137,800 per annum. The third respondent was also entitled to a host allowance of US25,493 per annum, an environmental allowance of US10,000 per annum and a target bonus of 25% of his salary per annum. During the third respondent's employment with the applicant company he was provided with free accommodation, club membership and a company car together with the service of a full time driver in accordance with his terms and conditions of service. In addition, the International Service Program Guide formed a part of the third respondent's contract of service with the applicant company. The International Service Program Guide explains in detail all policies, programs and allowances which were applicable to the third respondent's employment, including payment for the education of the third respondent's children, Car Purchase Assistance for the third respondent's wife and annual home leave for his family. Under the third respondent's terms and conditions of service with the applicant company, the third respondent was entitled to stock options. The subject matter of the dispute between the applicant and the third respondent pending in the Industrial Court now is that of the third respondent's constructive dismissal. The events leading to the third respondent's constructive dismissal with effect from 10 September 2001 are as follows:

(i) On 2 March 1998 at a breakfast meeting in Kuala Lumpur, the third respondent's immediate superior, Mr Marc Mathieu who was based in Singapore, informed the third respondent that he was no longer needed in the position of country manager, Malaysia and that he would be replaced by someone else. The third respondent was totally shocked by this news as he had never received any complaints on his performance, either verbal or in writing, since reporting for duty in Malaysia. The third respondent barely settled in as he only commenced employment in Malaysia in January 1998. When the third respondent queried Mr Marc Mathieu as to the reasons for his decision, the latter was not able to give any specific reason but told the third respondent to get in touch with one Mr Michael Bascle, the President of South of Pacific Division;

(ii) The third respondent's queries with Mr Michael Bascle were to no avail as he too could not give specific reasons for the applicant company's decision to remove the claimant. He only informed the third respondent that the third respondent had not done anything wrong and that he (Michael Bascle) was to blame for that decision;

(iii) On 30 March 1998, one Mr Scott Price arrived in Malaysia to take over the third respondent's position. The third respondent was told by Mr Marc Mathieu to hand over his duties to Mr Scott Price and the third respondent was instructed to stay away from the office to await further instructions;

(iv) Based on the assurances given to him by Mr Michael Bascle, the third respondent complied with this instruction and stayed away from the office;

(v) On 5 April 1998, the claimant was instructed to go to Vietnam to assist with a special project. The third respondent was further told by Mr Marc Mathieu that there would be discussions with him on his future job opportunities. The third respondent duly complied with this instruction;

(vi) Much to the third respondent's dismay and embarrassment, no such discussions took place in Vietnam. The third respondent then returned to Malaysia to await further instructions. When the third respondent spoke with Mr Marc Mathieu about the matter the third respondent was told that Mr Michael Bascle would get in touch with him (the third respondent);

(vii) Mr Michael Bascle did not get in touch with the third respondent until mid-June 1998 wherein he informed the third respondent that there may be a suitable position for him in Europe. During this discussion with Mr Michael Bascle, the third respondent voiced out his frustration at the lack of progress in resolving his position in the applicant company and that he was worried about his children's school arrangements. Mr Michael Bascle assured the third respondent that the matter would be resolved as soon as possible and he also verbally approved the third respondent's application for five weeks home leave to Australia. The formal application was later submitted to the applicant company as requested;

(viii) On 12 June 1998, the third respondent's secretary one Ms Maria Lee, who was then working for the new country manager informed the third respondent that Mr Marc Mathieu would not approve his leave application unless he surrendered his work permit to enable Mr Scott Price to obtain his work permit, which indicated that Mr Scott Price was working illegally in Malaysia since 30 March 1998. The third respondent refused to do so until his position in the applicant company was resolved to his satisfaction. The third respondent was subsequently informed that Mr Marc Mathieu had verbally approved his leave and that the applicant would pursue other avenues to secure the work permit for Mr Scott Price;

(ix) When the third respondent was away in Australia, the Human Resources Manager of Coca-Cola (Thailand) Limited telephoned the third respondent on numerous occasions between 15 June 1998 and 25 July 1998 and requested him to surrender his work permit to enable Mr Scott Price to obtain a work permit and to legalise his presence in Malaysia. The third respondent reiterated that he would not do so until the applicant company resolved his position;

(x) The third respondent and his family returned to Malaysia on 15 July 1998;

(xi) On 3 August 1998, the Human Resources Manager of Coca-Cola (Thailand) Limited sent a facsimile transmission to the third respondent wherein a schedule of events was set out to facilitate the surrender of his work permit including arrangement for his repatriation to Australia. The said Human Resources Manager further confirmed an appointment for the third respondent with one Mr Peter Baker of Coca-Cola Beverages Europe on 5 August 1998 in Bangkok. In an attempt to maintain a good relationship with the company and in order to ensure that his position was not jeopardised, the claimant reluctantly agreed to surrender his work permit;

(xii) At the interview with Mr Peter Baker in Bangkok on 5 August 1998, the third respondent was informed that he would have to attend a further interview in Europe on 25 August 1998;

(xiii) Upon his return from Bangkok, the applicant company required the third respondent to surrender his passport together with the passports of his family to enable the cancellation of his work permit;

(xiv) As required, the third respondent proceeded to Austria, Europe to attend interviews on 24 and 25 August 1998. The third respondent returned to Malaysia on 26 August 1998 to await the outcome of the interviews. However, no response was forthcoming despite the assurances given to him;

(xv) As the third respondent's work permit was cancelled, he had no choice but to continue to stay in Malaysia on a tourist visa. His family members were not given extensions to stay in Malaysia despite assurances by the applicant company that the third respondent had nothing to worry about;

(xvi) As the third respondent could no longer tolerate the callous manner in which the applicant company had treated him coupled with gross mismanagement of his career by the applicant company, the third respondent had no choice but to put on record *vide* letter dated 7 September 1998 the events that had transpired and requested the company to reinstate him to his former position of Country Manager, Malaysia (see exh. WJC-15 of encl. 1);

(xvii) On 7 September 1998 and 8 September 1998, the Human Resources Manager of Coca-Cola (Thailand) Limited informed the third respondent that the applicant company was not prepared to reinstate him to his former position as Country Manager, Malaysia;

(xviii) In the circumstances, the third respondent had no choice but to consider himself as being constructively dismissed by the company with effect from 10 September 1998 (see exh. WJC-16 of encl. 12).

The third respondent then made representations under s. 20(1) of the Act. As no settlement was reached the matter was referred to the first respondent for his decision under s. 20(3) of the Act. The first respondent decided to refer the third respondent's matter to the Industrial Court for adjudication. The first respondent's decision is in exh. NM9 in encl. 7. The applicant has pursuant to leave being granted by this court on 26 July 2001 now sought for an order of *certiorari* to quash the first respondent's reference. The applicant in its application contends that the first respondent had committed an error of law in excess of jurisdiction in that:

(1) The third respondent's claim is frivolous and vexatious;

(2) The first respondent had omitted to take into account that the third respondent's employer was Coca-Cola Export Corporation, Australia and that therefore the second respondent did not have extra territorial jurisdiction upon the matter;

(3) The third respondent had relinquished his position as Country Manager Branch five months earlier to his claim of constructive dismissal on 10 September 1998;

(4) The first respondent failed to take into account that the applicant was only a branch office of the Coca-Cola East Limited, Hong Kong and not the employer of the third respondent;

(5) The first respondent failed to take into account relevant consideration and/or took into account irrelevant consideration in his decision making process.

The grounds of the applicant's application can be summarised into the following two issues:

(a) Is the applicant the third respondent's employer?

(b) Does the Industrial Court have jurisdiction to adjudicate upon the dispute referred to it by the first respondent?

The applicant's contention is that the third respondent was an employee of Coca-Cola Export Corporation, Australia and that the third respondent was assigned to work in the applicant company reporting to the regional manager, based in Singapore. The applicant also contends that it was only a branch office of Coca-Cola Far East Limited, Hong Kong. The fact that the third respondent

was in the employment of the applicant company is clear from the nature of the third respondent's employment is such that he is transferred from country to country on promotion and in each country he is employed by the local Coca-Cola Company. The third respondent was first employed by Coca-Cola Bottlers Sydney Pty Ltd in Australia with effect from 1 January 1984. On 1 July 1985 the third respondent was transferred to the Coca-Cola Export Corporation Australia Branch in Sydney, Australia. (This company later became known as Coca-Cola Australia and now it is known as Coca-Cola South Pacific). Then, the third respondent was promoted to the position of National Accounts Executive by the Coca-Cola Export Corporation Australia Branch with effect from 1 July 1986. *Vide* a letter dated 29 April 1993 the third respondent was promoted to the position of marketing manager in Coca-Cola West Africa based in Abidjan, Cote d'Ivoire. The third respondent thus become an employee of Coca-Cola West Africa (see letter of appointment containing terms and conditions of employment in exh. WJC-2 of encl. 12 which was issued by Coca-Cola West Africa). The third respondent's departure from Coca-Cola South Pacific was announced in a memo dated 13 May 1993 issued by one Mr Victor K Lobley, the division President of Coca-Cola West Africa (see exh. WJC-3 of enclosure). That the third respondent was employed by Coca-Cola West Africa and not by the Coca-Cola Export Corporation Australia Branch as alleged by the applicant, is evident from the fact that the third respondent's salaries and benefits during his period of employment as marketing manager in Coca-Cola West Africa were paid by Coca-Cola West Africa and not by the Coca-Cola Export Corporation Australia Branch nor Coca-Cola South Pacific Pty Limited in Sydney, Australia (see copies of payslips at exh. WJC-4 and letter of incentive award for 1993 in exh. WJC-5 of encl. 12 issued by Coca-Cola West Africa). On 1 April 1995 the third respondent was appointed as director of marketing for Coca-Cola Northern Africa Division based in Nairobi, Kenya. The letter of appointment was issued by Coca-Cola Africa Limited (see exh. WJC-6 of encl. 12). The third respondent's salary was paid by Coca-Cola Africa Limited (see exh. WJC-7 of encl. 12) and he paid taxes to the Income Tax Department of the Republic of Kenya (see exh. WJC-8 of encl. 12). Again here it is clear that the third respondent was employed by the local Coca-Cola Company and not by the Coca-Cola Export Corporation Australia Branch nor Coca-Cola south Pacific in Sydney. *Vide* a letter dated 29 May 1996 the third respondent was appointed as country manager of Pakistan based in Lahore (see exh. WJC-9 of encl. 12). His salaries and benefits were paid by the Coca-Cola Export Corporation South West Asia Branch in Pakistan (see exh. WJC-11). *Vide* a letter dated 8 October 1997 the third respondent was appointed as country manager Malaysia with effect from 1 January 1998. The letter of appointment containing the terms and conditions of employment was issued by Coca-Cola Far East Limited Singapore

Branch (see exh. WJC-12 of encl. 12) because Malaysia Branch of Coca-Cola Far East Limited was still in the process of being set up. The first paragraph of the letter in exh. WJC-12 confirms that the third respondent was to be employed by the Malaysia Branch, which is the applicant in this case:

> Dear Warren,
>
> We are pleased to confirm the terms and conditions of your assignment in Kuala Lumpur, Malaysia as Country Manager, reporting to Region Manager, F&NCC Region. Your employment will be with the proposed Malaysia Branch, office of Coca-Cola Far East Limited and will be effective as of January 1, 1998. The employment proposed by this letter is conditional upon, and cannot be commenced prior to, the approval of the Branch office by the Malaysia authorities and their issuance of a work permit to you. This assignment may extend from three to five years, provided that you maintain your performance standards. However, the duration of an assignment of this type is based upon the relevant business needs.

While in the employment of the applicant as country manager, the third respondent's salaries and benefits were paid from Coca-Cola Southeast and West Asia Division office based in Thailand and the applicant would be invoiced subsequently for such payments made to the third respondent. This was because the applicant company did not have a payroll infrastructure at the material time, thus his salaries and benefits were paid by the applicant indirectly through Coca-Cola Southeast and West Asia Division (see exh. WJC-13 of encl. 12). The Coca-Cola Export Corporation or the Coca-Cola South Pacific Pty Ltd in Australia had nothing to do with the third respondent's employment in the applicant company.

The third respondent's status as an employee of the applicant is also evident from his employment pass issued by the Director General of Immigration, Malaysia (see exh. WJC-17 of encl. 12). The most cogent piece of evidence which shows that the third respondent was in fact and in law an employee of the applicant company at all material times is in two letters from the applicant itself. In exh. WJC-18 of encl. 12 (also found in exh. NM5 of encl. 3), one Mr Nick Staheyeff of the applicant company states in unambiguous terms that:

> The purpose of this letter is to reassure you that you are still in International Service for Coca-Cola and that you are currently employed by Coca-Cola Far East Limited Malaysia Branch. As you know it is usual practice at Coca-Cola to transfer International Service Employees from time to time to other locations. In addition to the offers already proposed to you we understand that the offer of a new and suitable position in Europe will be confirmed in writing to you soon.

The status of the third respondent's employment in the applicant company is further confirmed in exh. WJC-19 of encl. 12 (also found in exh. NM7 of encl. 3):

> Further to our letter dated September 10, 1998 this is to confirm again that you are currently employed by Coca-Cola Far East Limited Malaysia Branch.

The author of WJC-18 and WJC-19 is Mr Nick Staheyeff of the applicant company and there is thus far no affidavit affirmed by him to deny the contents of his letters, namely that the third respondent was employed by the applicant company. In the absence of such an affidavit, the court could accept the contents of WJC-18 and WJC-19 as the truth. In the absence of an affidavit by Nick Staheyeff, the averment made by Nora binti Mahbob at para. 28 of encl. 3 as follows is purely hearsay:

> 28. I verily believe that the Applicant wrote to the Third Respondent on 15th September 1998 reconfirming that the Third Respondent had been advised to consider other similar positions currently offered to him and further confirmed that the Third Respondent was still employed by the Applicant, which incidentally was a factual error as the Third Respondent was never employed by the Applicant.

In the case of *Datuk Bandar Kuala Lumpur v. Zain Azahari bin Zainal Abidin* [1997] 2 CLJ 248 of the Court of Appeal held that "an affidavit by a deponent who has no personal knowledge of the considerations upon which the decision was based is pure heresay and is worthless as evidence and no court can be expected to pay the slightest attention to it." I therefore reject the averments regarding the contents of exhs WJC-18 and WJC-19 in the affidavit of Nora binti Mahbob (encl. 3).

While in the employment of the applicant company in Malaysia the third respondent also paid taxes levied by the Inland Revenue authorities of Malaysia. Exhibit WJC-20 clearly shows the applicant as the third respondent's employer. Under s. 2 of the Act, the term "employer" is defined as follows:

> "employer" means any person or body of persons whether corporate or incorporate, who employs a workman under a contract of employment, and includes the Government and any statutory authority, unless otherwise expressly stated in this Act.

Therefore based on the facts above, the applicant company had clearly employed the third respondent under a contract of employment and thus the applicant is the employer of the third respondent.

The applicant's second ground of challenge is an issue of extra-territorial jurisdiction. The applicant contends that the Industrial Court/second respondent

is not conferred with extra-territorial jurisdiction and it ought not hear the matter of the third respondent's dismissal because the employer allegedly was Coca-Cola Export Corporation Australia, a company not within jurisdiction. I think the applicant has clouded the issue of extra-territoriality. My opinion is that the Industrial Court being a creature of statute undoubtedly does not have extra-territorial jurisdiction as the Act does not confer it. However, in this instant case the third respondent's employer is the applicant and not any of the Coca-Cola companies based in Australia. The applicant is a Malaysian registered company within jurisdiction. The third respondent is required to perform his contract of employment as country manager, malaysian within jurisdiction. The issue of extra-territoriality, thus does not arise at all in this instant case. The employer-employee relationship between the applicant and the third respondent is clear from the letter of appointment issued to the third respondent (see exh. WJC-12 of encl. 12) and as noted earlier, this letter was issued by Coca-Cola Far East Limited Singapore Branch because the applicant company was still in the process of being set up. Exhibit WJC-12 was signed by one Mr Gavan W Simmons. The applicant company came within Mr Simmons' supervision during his tenure as regional manager. Mr Simmons in his affidavit affirmed on 12 October 2001 (encl. 11) states the following:

(a) The applicant is a branch of Coca-Cola Far East Limited registered in Malaysia;

(b) According to exh. WJC-12 (also found in exh. NM-3 encl. 3), the third respondent's appointment as country manager, Malaysia was based on a permanent contract of employment with the applicant company;

(c) During the third respondent's period of employment with the applicant company, Coca-Cola South Pacific Pty Ltd (formerly known as The Coca-Cola Export Corporation Australia Branch) had nothing to do with the contract of employment between the applicant company and the third respondent except in the payment of the third respondent's superannuation entitlement into the Coca-Cola Australian Superannuation Fund. Such payments made by Coca-Cola South Pacific Pty. Ltd. would be reimbursed by the applicant company. These facts averred by Mr Simmons are within his knowledge and belief as he was appointed to the position of finance manager in Coca-Cola South Pacific in Australia sometime in January 1998, shortly after the third respondent's commencement of employment in the applicant company.

The third respondent's employment was extra-territorial in nature allegedly due to the fact that the contract of employment (exh. WJC-12) was concluded outside Malaysia and that the applicant company did not issue the said contract

of employment. However, the signatory of the said contract, Mr Gavan Simmons, had in his affidavit (encl. 11) clearly stated that the third respondent's appointment as country manager, Malaysia was based on a permanent contract of employment with the applicant company (see para. 13 of encl. 11). He further averred that during the third respondent's period of employment with the applicant company, Coca-Cola South Pacific Pty Ltd in Sydney, Australia of which he was the finance manager, had nothing to do with the contract of employment between the applicant and the third respondent except in the payment of the third respondent's Australian superannuation entitlement into the Coca-Cola Australian Superannuation Fund. Such payments made by Coca-Cola South Pacific would be reimbursed by the applicant company (see para. 18 of encl. 11). The third respondent's contract of employment was not issued by the applicant company at the material time because the applicant company was being proposed to be set up (see para. 1 of exh. WJC-12).

The law regarding the jurisdiction of the Industrial Court is clearly stated in the case of *Mostek Malaysia Sdn Bh., Penang v. Cik Aniza Yaacob & Ors* [1986] 2 ILR 1276:

> We find that the Court in Award No. 187 of 1986 (Ruling) has stated the law truly and simply as follows:
>
> The Industrial Court is a creature of statute, ie, the Industrial Relations Act, 1967. Its powers are derived from provisions of the statute which are the rules of the game and the Industrial Court has to decide according to these rules. The powers conferred upon the Industrial Court have the force of law behind it and are not exercisable by reason of discretion vested in it. In other words, the Industrial Court has to function within the limits imposed by the statute that created it and to act according to its provisions. Section 29(a) of the Act empowers the Industrial Court to join, substitute or strike off any party. But has the Industrial Court the power to join, substitute or strike off any party which are outside its territorial limits? I do not think so because the Industrial Court has no extra territorial jurisdiction. The Industrial Relations Act, 1967 is a Malaysian Act. It does not extend to USA or any foreign country and does not contain any provisions whatsoever contemplating its execution in the USA or in any foreign country. Such being the case, I hold that the Industrial Court has no power to join UTC as a party to the proceedings because UTC cannot be subjected to the jurisdiction of the Court. I also hold that the Industrial Court have no power to order service outside of jurisdiction as there is no provision in the Act or in its rules to effect such a service. For the reasons given above, I dismiss the application.

In *Comex Services Asia Pacific Region, Miri v. Graeme Ashley Power* [1987] 2 ILR 34 (Award 224 of 1987) the Industrial Court followed the decision in Mostek and held thus:

> In the circumstances the Company Comex Services SA being foreign-registered company with no registered office or branch in Malaysia the Court rules that it had no jurisdiction to entertain the Claimant's claim.

In this instant case, the applicant company is registered in Malaysia and operates an office in Malaysia. As such the applicant is subject to the jurisdiction of the Industrial Court of Malaysia in respect of the third respondent's claim of unfair dismissal. Another authoritative case on point is the Court of Appeal case of *Kathiravelu Ganesan & Anor v. Kojasa Holdings Bhd* [1997] 3 CLJ 777 wherein Gopal Sri Ram JCA delivering the judgment of the Court held thus:

> In our judgment, the facts of this case do not give rise to the exercise of any extra-territorial jurisdiction by the Industrial Court. The fact that the appellant was engaged within the jurisdiction by an employer within the jurisdiction concludes the issue of extra-territoriality against the respondent. That the appellant was required to perform his contract of employment is another company in a foreign country and was required to pay the taxes levied by that country or to make payments towards any compulsory saving scheme that was in operation in that country cannot, in our judgment, make the dispute extra-territorial in nature. Further, one should not lose sight of the fact that the power to dismiss the appellant was at all times vested in the respondent who was well within the territorial jurisdiction of the Industrial Court.

Applying the above to this instant case, there is also no issue of extra-territoriality as the third respondent was engaged within the jurisdiction by an employer, namely the applicant company within the jurisdiction. The third respondent was at all times subject to the management prerogatives and directions of the applicant as evident from exhs. WJC-18 and WJC-19 of encl. 12. The power to dismiss the third respondent did not vest in the Australian company nor the Hong Kong company. It is vested in the applicant company.

The applicant has submitted that the third respondent's claim for reinstatement filed under s. 20(1) of the Act was filed outside the 60 days limit under s. 20(1A) of the Act. The applicant contends that time began to run from the date when the third respondent handed over his duties as country manager to Mr Scott Price, that is on 4 April 1998. The applicant contends that the third respondent's position as country manager ended at the latest on 4 April 1998. Thus, his representation under s. 20(1) filed on 11 September 1998 was allegedly outside the 60 days time limit. The facts of the case, in particular the events that transpired between the date the third respondent was told that he would be replaced by Mr Scott Price and the date of his constructive dismissal (10 September 1998), applied to the law applicable to time limit would clearly show that the third respondent' claim was not time-barred. The relevant

facts leading to the third respondent's constructive dismissal on 10 September 1998 are as follows:

(a) On 2 March 1998, the third respondent informed by his immediate superior, Mr Marc Mathieu that he was to be replaced by someone else as country manager;

(b) On 30 March 1998, one Mr Scott Price arrived in Malaysia to take over the third respondent's position. The third respondent was told by Mr Marc Mathieu to hand over his duties to Mr Scott Price and the third respondent was instructed to stay away from the office to await further instructions;

(c) On 5 April 1998, the third respondent was instructed to go to Vietnam to assist with a special project. The third respondent was further told by Mr Marc Mathieu that there would be discussions with him on his future job opportunities;

(d) No such discussions took place in Vietnam. The third respondent returned to Malaysia to await further instructions. When the third respondent spoke to Mr Marc Mathieu about the matter he was told that Mr Michael Bascle, the President of Coca-Cola Southeast & West Asia Division based in Thailand would get in touch with him;

(e) Mr Machael Bascle did not get in touch with the third respondent until mid-June 1998 wherein he informed the third respondent that there may be a suitable position for him in Europe;

(f) Thereafter the third respondent went on five weeks home leave to Australia. While he was away in Australia, the third respondent was repeatedly asked to surrender his work permit to enable Mr Scott Price to obtain a work permit;

(g) The third respondent and his family returned to Malaysia on 26 July 1998;

(h) Thereafter the claimant was required to go to Bangkok (on 5 August 1998) and Austria (on 24 August 1998 and 25 August 1998) to attend interviews for a possible position in Europe. He returned to Malaysia on 26 August 1998 to await the outcome of the interviews. However, no response was forthcoming despite the assurances given to him;

(i) As the third respondent's work permit was cancelled, he had no choice but to continue to stay in Malaysia on a tourist visa;

(j) The third respondent could no longer tolerate the callous manner in which the applicant had treated him. The applicant company had grossly

mismanaged his career. *Vide* letter dated 7 September 1998 he put on record the events that had transpired and requested the applicant to reinstate him to his former position of Country Manager, Malaysia;

(k) On 7 September 1998 and 8 September 1998 the Human Resources Manager of Coca-Cola Southeast & West Asia Division informed the third respondent that the applicant company was not prepared to reinstate him to his former position as Country Manager, Malaysia;

(l) In the circumstances, the third respondent considered himself as being constructively dismissed by the applicant company with effect from 10 September 1998 (see exh. WJC-16 of encl. 12);

(m) On 11 September 1998 the third respondent made representations under s. 20(1) of the Act to the Director General of Industrial Relations.

From the above it is clear that the third respondent considered himself to be constructively dismissed by the applicant company after the events on 7 September 1998 and 8 September 1998.

On the facts above, I am of the view that the 60-day time frame did not commence from the date when the third respondent was replaced by Mr Scott Price as country manager. After the replacement, there was a series of events where the third respondent was seeking a resolution of his status of employment with the applicant company. When the applicant company failed to remedy the third respondent's grievances as stated in his letter of 7 September 1998 (exh. WJC-15 of encl. 12) and failed to reinstate the third respondent, the latter considered himself as being constructively dismissed with effect from 10 September 1998 (see exh. WJC-16 of encl. 12). In the circumstances, time under s. 20(1A) has to begin to run from 10 September 1998. Consequently, the third respondent's representation filed on 11 September 1998 was made within time.

In *Pan Global Textiles Bhd. Pulau Pinang v. Ang Beng Teik* [2002] 1 CLJ 181, the facts relevant for our present purposes on the issue of time may be gleaned from p. 190 of the report as follows:

(a) On 2 May 1989 the appellant wrote to the respondent informing him that the domestic inquiry had found the charges against him to be proven. As such, the respondent had been reduced in rank and was asked to report for duty on 3 May 1989. The respondent, however, did not report for work;

(d) On 12 May 1989, the appellant wrote requesting the respondent to report for duty in his reduced rank. In his reply of 17 May 1989, the respondent stated his reasons for refusing to report for work;

(e) On 24 May 1989 the appellant wrote to the respondent "giving him seven days to state in writing whether he is prepared to abide by the domestic inquiry's decision". The appellant also stated in that letter that if there was no response from the respondent, the appellant would assume that the respondent was "no longer interested in his employment with" the appellant;

(f) On 6 June the appellant wrote to the respondent "terminating his services on the ground that he is no longer interested in his employment";

(g) On 20 July 1989, the respondent made representations to the Director-General.

The Federal Court held as follows:

> After considering, amongst other things, the abovementioned facts, the Court of Appeal said that it was quite obvious that the respondent did not treat the demotion in rank as amounting to a dismissal. The Court of Appeal then stressed that the Minister referred to the Industrial Court the issue of the alleged dismissal of the respondent on 6 June 1989. This is because, according to the Court of Appeal, the respondent had not until 6th June 1989, considered himself as having been dismissed without just cause or excuse. The Court of Appeal then held:
>
> > On the facts of this case, it is beyond question that the 60-day time frame did not commence from the date of the demotion – which was never challenged – but from the date of the impugned termination. It follows that the representation were made within the prescribe time limit. The Industrial Court was accordingly not without jurisdiction to entertain the reference.

Further at p. 195 of the report the Federal Court held:

> In the appeal before us, the evidence, as pointed out by the Court of Appeal, do not go to support an intention on the part of the respondent to bring his contract to an end. As said by the Court of Appeal in its judgment, the respondent, in a series of correspondence between him and the appellant, was arguing with the appellant that he ought to suffer no demotion. The respondent's letter of 27 May 1989 to the appellant referred to by the Industrial Court in its award supports this view of the Court of Appeal. As such the respondent's misconduct cannot be one which is sufficient to discharge his contract without any need for acceptance. Hence time cannot run from 3 May 1989, the date when the respondent began to absent himself from work.

Hence, the third respondent's representation under s. 20 of the Act was within time.

In the Supreme Court case of *Minister of Labour, The Goverment of Malaysia v. Lie Seng Fatt* [1990] 1 CLJ 1103; [1990] 1 CLJ (Rep) 195, Hashim Yeop Sani, SCJ laid down the test for the exercise of the Minister's discretion under s. 20(3):

> The minister's discretion under s. 20(3) is wide but not unlimited. As stated earlier, so long as he exercises the discretion without improper motive, the exercise of discretion must not be interfered with by the court unless he had misdirected himself in law or had taken into account irrelevant matters or had not taken into consideration relevant matters or that his decision militates against the object of the statute. Otherwise he had a complete discretion to refuse to refer a complaint which is clearly frivolous or vexatious which in our view this is one.

In the instant case the Minister had exercised his discretion to refer a complaint to the Industrial Court and the exercise of that discretion could only be interfered with if the representation made under s. 20(1) were frivolous or vexatious, the Minister misdirected himself in law, the Minister took into account irrelevant matters, the Minister failed to take into account relevant matters, or his decision militates against the object of the Act.

In conclusion I am of the opinion that the third respondent was employed by the applicant company. The applicant company is an employer within the jurisdiction of the Industrial Court. The matter of the third respondent's constructive dismissal is not frivolous or vexatious and ought to be adjudicated in the Industrial Court. In the circumstances, the applicant's application is hereby dismissed with costs.